

Date: September 14, 2023

From: Executive Director, Office of Acquisition and Logistics (003A), and Senior Procurement Executive

Subj: Class Deviation from the Federal Acquisition Regulation (FAR) Regarding the Small Business Administration (SBA) Memorandum on the Verification of Eligibility for the 8(a) Program

To: Heads of the Contracting Activities

**1. Purpose.** This class deviation allows the VA to comply with the SBA memorandum dated August 18, 2023. The memorandum provides guidance to agencies on the process for issuing awards under the 8(a) Business Development Program in response to a recent court decision (*Ultima Servs. Corp. v. Department of Agriculture*). This deviation is issued in advance of a FAR final rule as authorized by CAAC letter [2023-04](#) and establishes deviations from FAR 19.804-3.

**2. Effective Date.** Immediately.

**3. Expiration Date.** This deviation expires when incorporated into the FAR or is otherwise rescinded.

**4. Applicability.** This deviation applies to new 8(a) awards or orders placed to individual-owned small business participants that previously relied on the presumption of social disadvantage to support its eligibility.

(a) This deviation applies to the following actions:

(i) Competitive or sole-source 8(a) contracts;

(ii) 8(a) sole-source orders placed against existing or new 8(a) set-aside multiple-award contracts, including Governmentwide acquisition contracts (GWACS) and Federal Supply Schedule (FSS) contracts;

(iii) 8(a) orders placed against existing or new non-8(a) set-aside multiple-award contracts, including GWACS and FSS contracts;

(iv) 8(a) orders under blanket purchase agreements or basic ordering agreements;

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(iv) Out-of-scope modifications and unpriced options under existing 8(a) contracts;  
and

(v) Requests for novations.

(b) Except as noted in paragraph 4(a), existing 8(a) contracts are not impacted by this deviation. An affirmation determination of social disadvantage by the SBA is not required for contracts awarded using 8(a) authority when—

(i) Exercising a priced option;

(ii) Making an award on competitive task orders under 8(a) multiple-award contracts;

(ii) Issuing an in-scope modification; or

(iii) Making award to 8(a) businesses owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations.

**5. Current FAR Policy.** Currently, [FAR 19.804-3](#), SBA acceptance, states if SBA does not respond to contracting office's 8(a) program offering letter within the timeframes specified in paragraphs (a)(1) and (2), the contracting office may assume that SBA has accepted the requirement into the 8(a) program.

**6. Need for Deviation.** On July 19, 2023, the United States District Court for the Eastern District of Tennessee enjoined SBA "from using the rebuttable presumption of social disadvantage in administering" the 8(a) Business Development Program (8(a) Program). The rebuttable presumption assumes, unless there is evidence to the contrary, that members of certain racial and ethnic groups qualify as socially disadvantaged within the meaning of the 8(a) Program requirements.

The injunction specifically affects 8(a) Program participants that are "individual-owned small businesses which used the rebuttable presumption of social disadvantage to establish eligibility." The injunction does not affect 8(a) Program participants that are "individual-owned small businesses which did not use the rebuttable presumption of social disadvantage," or "entity-owned small businesses," such as businesses that are owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations.

SBA, in conjunction with the Department of Justice (DOJ), prepared the SBA Memorandum which provides interim guidance for agencies to follow. Compliance with that guidance will require agencies to deviate from certain FAR requirements for the 8(a) Program.

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The SBA Memorandum requires that, before an award can be made to an individual-owned small business participant that previously relied on the presumption of social disadvantage to support its eligibility, SBA must make an affirmative determination that the individual upon whom eligibility is based has established personal social disadvantage without the presumption. When required, SBA will make their affirmative determination of eligibility as a part of the offer and acceptance process.

**7. Required Action.** Contracting officers will use the procedures in this class deviation to verify a concern's eligibility for the 8(a) Program in lieu of using the System for Award Management or presuming acceptance of a requirement by the Small Business Administration (SBA) prior to making an award under the 8(a) Program.

(a) SBA is maintaining a list of 8(a) participants that it has determined are eligible for award because—

(i) SBA has made an affirmative determination that the individual-owned small business participant is socially disadvantaged;

(ii) The small business participant did not use the rebuttable presumption of social disadvantage and does not require affirmation; or

(ii) An affirmation is not required for "entity-owned small businesses."

(b) The SBA list of 8(a) participants that it has determined eligible for award is available for government-only review within the Office of Management and Budget's MAX.gov platform on the [SBA Office of Policy, Planning and Liaison \(OPPL\) Collaboration](#) page. SBA is also sending qualification letters to every current 8(a) Program participant that is eligible for award.

(c) When the contract action applies to an individual-owned small business participant that has not received an affirmative determination of social disadvantage by SBA (e.g., the entity is not on the SBA list), contracting officers should follow the procedures at FAR subpart 19.8 regarding offer and acceptance under the 8(a) Program, including the FAR deviations to paragraphs 19.804(a)(1) and (a)(2) as shown in the attachment to this deviation.


(d) Notwithstanding this deviation, the requirements at [VAAR 819.811-370](#) are not impacted.

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**8. Additional information.** Send questions to [va.procurement.policy@va.gov](mailto:va.procurement.policy@va.gov).

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Attachment

Deviation to FAR Text at FAR 19.804-3, SBA Acceptance

ATTACHMENT - Deviation to FAR Text

Baseline is accurate through FAC 2023-05, to be effective September 22, 2023.  
Changes to baseline shown as **[bolded, bracketed additions]** and ~~struckthrough deletions~~.  
FAR text unchanged shown as asterisks.

**Part 19 - Small Business Programs**

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**Subpart 19.8 - Contracting with the Small Business Administration (The 8(a) Program)**

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**19.804 Evaluation, offering, and acceptance.**

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**19.804-3 SBA acceptance.**

(a) Upon receipt of the contracting office's offering letter, SBA will determine whether to accept the requirement for the 8(a) program. SBA's decision whether to accept the requirement will be transmitted to the contracting office in writing within 10 working days of receipt of the offer if the contract is likely to exceed the simplified acquisition threshold and within two working days of receipt if the contract is at or below the simplified acquisition threshold. The contracting office may grant an extension of these time periods, if requested by SBA.

(1) For acquisitions exceeding the simplified acquisition threshold, if SBA does not respond to an offering letter within ten working days, the contracting office may seek SBA's acceptance through the Associate Administrator for Business Development. The contracting office **[must receive SBA's decision of acceptance before proceeding with award of an 8(a) contract]** ~~may assume that SBA has accepted the requirement into the 8(a) program if it does not receive a reply from the Associate~~

~~Administrator for Business Development within five calendar days of receipt of the contracting office's request.~~

(2) For acquisitions not exceeding the simplified acquisition threshold, **[the contracting office must receive SBA's decision of acceptance before proceeding with award of an 8(a) contract]**~~when the contracting office makes an offer to the 8(a) program on behalf of a specific 8(a) participant and does not receive a reply to its offering letter within two working days, the contracting office may assume the offer is accepted and proceed with award of an 8(a) contract.~~

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